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No. 88-349

In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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PETITIONER'S REPLY MEMORANDUM

The United States Department of Agriculture, Farmers Home Administration Finance Office, St. Louis, Missouri, and the Defense Mapping Agency Aerospace Center, St. Louis, Missouri, in their brief responding to the Federal Labor Relations Authority's certiorari petition, agree with the Authority that the court below erred in allowing individual bargaining unit employees the option of directing their federal agency employers to withhold release of the employees' names and home addresses to the employees' exclusive bargaining representatives (Resp. Br. 17-18). The federal agency respondents also indicate that they are in the process of issuing "routine uses" under provisions of the Privacy Act, 5 U.S.C. 552a(a)(7) and (e)(4)(D), permitting disclosure to labor organizations of home addresses or designated mailing addresses of unit employees (Resp. Br. 20-21). The agency respondents indicate that upon final issuance of these routine uses the Privacy Act will

be eliminated as a bar to disclosure of this data to exclusive representatives in these agencies under 5 U.S.C. 552a(b)(3) (Resp. Br. 21). Accordingly, the Eighth Circuit's analysis under 5 U.S.C. 552a(b)(2) of whether disclosure of the data is required under the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1982 & Supp. IV), which analysis includes the Eighth Circuit's conclusion as to individual employees' "opt out" rights, would become "irrelevant" (Resp. Br. 21). In conclusion, the agency respondents suggest that the Court hold the Authority's certiorari petition pending finalization of the two routine uses; then grant the Authority's petition; vacate the judgment of the lower court; and remand the case to the lower court for further consideration in light of the new routine uses.

The Authority does not oppose the agency respondents' suggestion that the Authority's certiorari petition be held pending finalization of the routine uses; and that upon their finalization the certiorari petition be granted and the judgment of the Eighth Circuit be vacated.[1] However, the Authority does not concur that the terms

[1] The Authority's concurrence in these aspects of the agencies' suggestion for disposition of this case does not constitute a stipulation that issuance of the routine uses contemplated by the agencies is a necessary requisite to disclosure of employee names and home addresses under Section 7114(b)(4) of the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. 7114(b)(4). The Authority held in its decisions at issue in this case that an already-existing routine use promulgated by the Office of Personnel Management, generally dealing with data disclosure to exclusive representatives, in itself eliminates the Privacy Act as a barrier to disclosure of employee names and home addresses (Authority Pet. 45a-46a). The Authority continues to adhere to this position, as well as its holding that disclosure of the subject data is required under the FOIA (Authority Pet. 43a-45a).

of the remand to the lower court should allow that court to reconsider the matter in light of the new routine uses. Rather, in the Authority's view the remand to the lower court should be with the direction that the court issue a judgment enforcing the Authority's orders in this case in full.[2]

This Court has issued the kind of summary reconsideration order suggested here by the respondent agencies when there is doubt whether the intervening event giving rise to the suggestion for reconsideration by the lower court would alter the lower court's ruling. See, *e.g., Bureau of Economic Analysis* v. *Long,* 454 U.S. 934 (1981) (remand for reconsideration ordered where intervening enactment of a statute may affect lower court's ruling issued prior to enactment of the law); *Henry* v. *City of Rock Hill,* 376 U.S. 776, 777 (1964) (remand for reconsideration ordered where intervening precedent of this Court may be sufficiently analogous to case under review by the Court to warrant reexamination of the case by lower court).

In the instant case, by contrast, the parties are unanimous in their view that the employee option aspect of the lower court's ruling at issue in the instant case is in error; and that issuance of the routine uses con-

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[2] The respondent agencies also suggest (Resp. Br. 22 n.12) that if the Court declines to grant the Authority's certiorari petition, vacate the lower court's judgment, and remand for further consideration in light of the new routine uses, the Court should in any event summarily reverse the Eighth Circuit's "opt out" requirement as unsupported by law. The Authority does not oppose this alternative suggestion, based on the understanding that summary reversal on this ground would necessarily entail a direction to the lower court to issue a judgment enforcing the Authority's orders in full.

templated by the respondent agencies must result in a judgment of enforcement in full by the Eighth Circuit. In this connection, the respondent agencies state that upon final issuance of the routine uses, "there will be no obstacle to enforcement of the Authority's orders on remand. Thus, we will agree with the Authority on remand that the Eighth Circuit should enforce those orders in full" (Resp. Br. 22). In such circumstances it would appear more appropriate for this Court to direct the lower court on remand to enter a judgment of enforcement in full, rather than allow that court to reconsider the matter. *Rinaldi* v. *United States,* 434 U.S. 22 (1977) (government's admitting error of lower court ruling warrants this Court vacating lower court judgment with direction to issue appropriate judgment). In short, since it appears clear to all parties that there is nothing for the lower court to reconsider on remand upon issuance of the new routine uses, a remand allowing for reconsideration by that court is inappropriate.[3]

Respectfully submitted,

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[3] Charles Fried, Solicitor General, authorized the filing of this Memorandum.

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